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In The
Supreme Court of the United States

JOHN D. MASHBURN,
U.S. Bankruptcy Trustee Of the Bankruptcy Estate
of Toby Scrivner and Angelique Pissano,

Petitioner,

v.

TOBY SCRIVNER and ANGELIQUE PISANO,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Respondents (bankruptcy debtors) owned an interest in the television show "Cheaters" when they filed bankruptcy. The ownership interest and post-petition dividends from Cheaters were non-exempt property of the bankruptcy estate. Respondents received $17,424.75 in Cheaters dividends after filing bankruptcy, $13,304.20 of which was received *after* Respondents received notice of a turnover motion filed by Petitioner (the assigned U.S. Bankruptcy Trustee). Then, when Respondents refused to obey the bankruptcy court's order to turn over the funds to the Petitioner, the bankruptcy court granted Petitioner a surcharge against Respondents' otherwise exempt assets to the extent necessary to make the estate whole. The Bankruptcy Appellate Panel for the Tenth Circuit Court of Appeals affirmed but the Tenth Circuit Court of Appeals reversed thereby creating a conflict between the Tenth and Ninth Circuits as well as a number of lower courts in other Circuits. The question now presented is:

Where a bankruptcy debtor takes bankruptcy estate funds and then refuses to obey a bankruptcy court's order to turn over the funds to the bankruptcy trustee, does the bankruptcy court have discretion – whether under its inherent power to sanction and deter bad faith conduct and/or by the broad authority of 11 U.S.C. § 105 – to grant the trustee a surcharge against the debtor's otherwise exempt property to the extent necessary to make the estate whole?

PARTIES TO THE PROCEEDING

Petitioner (Appellee below):

JOHN D. MASHBURN, U.S. Bankruptcy Trustee of the Bankruptcy Estate of Toby Scrivner and Angelique Pissano.

Respondents (Appellants below):

TOBY SCRIVNER and ANGELIQUE PISSANO.

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The "Order on Trustee's Motion for Order of Contempt and Motion to Surcharge Debtors' Exemptions for Failure to Comply with Order for Turnover," filed October 24, 2006, in the United States Bankruptcy Court for the Western District of Oklahoma, is unreported and is reprinted in the Appendix at App. 52. The opinion of the Bankruptcy Appellate Panel of the Court of Appeals (App., 17) is reported at 370 B.R. 346 (10thCir.BAP 2007). The opinion of the Court of Appeals (App. 1) is reported at 535 F.3d 1258 (10thCir. 2008). The final Judgment entered by the Court of Appeals is unreported and is reprinted in the Appendix at App. 56.

BASIS FOR JURISDICTION IN THIS COURT

Petitioner seeks review of the Judgment of the Tenth Circuit Court of Appeals. The Judgment was filed August 11, 2008. This Petition is being filed within 90 days after said Judgment after applying U.S. Sup. Ct. Rule 30.1 and taking into account that the last day of the period is a Sunday.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. 11 U.S.C. § 105 **Power of the Court**[1]

> (a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.
>
> . . . .

2. 11 U.S.C. § 522 **Exemptions**

> . . . .
>
> (c) Unless the case is dismissed, property exempted under this section is not liable during or after the case for any debt of the debtor that arose, or that is determined under section 502 of this title as if such debt had arisen, before the commencement of the case, except –

---

[1] Respondents' Petition for Relief was filed on October 14, 2005, immediately prior to the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. References to the Bankruptcy Code and Rules are to those in effect on October 14, 2005. However, unless indicated otherwise, the cited bankruptcy texts are the same as those currently in effect.

. . . .

(k) Property that the debtor exempts under this section is not liable for payment of any administrative expense except –

. . . .

STATEMENT OF THE CASE

Respondents filed their Petition for Relief under Chapter 7 of the United States Bankruptcy Code on October 14, 2005. Being the last day for filing prior to the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA"), Respondents' bankruptcy came at the crest of the wave of pre-BAPCPA filings and the accompanying dramatic increase in the case load of all bankruptcy trustees.

Petitioner was and is the appointed Chapter 7 Trustee for Respondents' case. In their bankruptcy schedules, Respondents listed a .5% interest in a television show called "Cheaters." They did not and have not claimed an exemption for their interest (a business investment) in Cheaters. (App. 2, 15, 16, 53). On June 1, 2006, after notice and hearing, the bankruptcy court granted the Petitioner's Motion to Turn Over the Cheaters ownership interest and income directing Respondents to turn over to Petitioner all post-petition income received from Cheaters (hereafter the "Turnover Order"). (App. 18, 19).

The Respondents neither appealed nor complied with the Turnover Order. Respondents defrauded the bankruptcy estate of $17,424.75 in Cheaters dividends, over $13,000.00 of which was received *after* Respondents had notice of Petitioner's Motion to Turn Over the Cheaters income. (App. 19, 53). Ultimately, Petitioner was able to locate the Producer of Cheaters and served him with a copy of the Turnover Order and a demand that all future Cheaters dividends be paid directly to Petitioner. Since June, 2006, Cheaters has complied with Petitioner's demand remitting distributions directly to the Petitioner. (App. 3).

Respondents continued to disobey the bankruptcy court's Turnover Order. After notice and a contested hearing on October 17, 2006, the Bankruptcy Court sustained a Motion of the Petitioner and entered, on October 24, 2006, its "Order on Trustee's Motion for Order of Contempt and Motion to Surcharge Debtors' Exemptions for Failure to Comply with Order for Turnover" (hereafter the "Surcharge Order"). The Surcharge Order provided:

> 1. Debtors shall pay the Trustee $17,424.75 . . .
>
> 2. Debtors shall further pay the Trustee interest . . .
>
> 3. Debtors shall further pay the Trustee the sum of $1,500.00, which the Court determines to be a reasonable attorney fee . . .
>
> . . . .

> 5. In the event said funds are not delivered to the Trustee by November 6, 2006, then the Trustee may surcharge and is hereby granted a surcharge against the Debtors' exempt property, including Debtors' retirement funds, to the extent necessary to satisfy the sums owed under paragraphs 1 through 3 above.
>
> 6. Said surcharge shall be in the amount necessary to net to the Estate and Trustee the payment of the sums owed under paragraphs 1 through 3 above and that any taxes, penalties or fees incurred by reason of the withdrawal or borrowing of said retirement accounts shall be born by the Debtors. The Estate and Trustee shall bear such tax liability as would have been incurred for receipt of the distributions from Debtors' ownership of the Limited Partnership in the Cheaters LLC TV Show as if such funds had been turned over to the Trustee without surcharge of the exempt assets.
>
> . . . . (App. 52-55).

The Respondents timely appealed the Surcharge Order to the Bankruptcy Appellate Panel of the Tenth Circuit Court of Appeals (hereafter the "BAP") arguing that the Cheaters funds are exempt (an attack on the original Turnover Order); that the bankruptcy court lacked authority to surcharge their exempt property; and various procedural arguments. (App. 22, 23). The BAP affirmed finding: (1) In issuing the Turnover Order the bankruptcy court implicitly

determined that the Cheaters funds were property of the bankruptcy estate and not exempt and that when Respondents failed to appeal the Turnover Order that determination became the Law of the Case preventing them from now arguing that the Cheaters funds are exempt; (App. 23), (2) Election of remedies and other procedural defenses were not raised by Respondents in objecting to the Surcharge Motion and therefore may not be raised for the first time on appeal; (App. 24.), and (3) That the bankruptcy court has authority to surcharge exemptions following the reasoning set forth in *Latman v. Burdette*, 366 F.3d 774 (9thCir. 2004), and relying in part on *Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365, 127 S.Ct. 1105, 166 L.Ed.2d 956 (2007). (App. 25-34).

The Respondents timely appealed the ruling of the BAP to the Tenth Circuit Court of Appeals. By Judgment filed August 11, 2008, the Tenth Circuit reversed the BAP's judgment and the bankruptcy court's order authorizing the surcharge of the Respondents' exempt assets. (App. 2, 56)

REASONS FOR GRANTING THE WRIT

Proposition 1: The Tenth Circuit Court of Appeals Has Incorrectly Decided an Important Federal Bankruptcy Question in a Way Which Squarely Conflicts with an Established Decision of the Ninth Circuit Court of Appeals and Which Has Already Resulted in Confusion, Uncertainty and Varying Standards among Lower Courts.

The principal purpose of the Bankruptcy Code is to provide a "fresh start" to the "honest but unfortunate debtor" allowing an insolvent debtor to discharge certain debts following the liquidation of the debtor's assets by a bankruptcy trustee, who then distributes the proceeds to creditors. *Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365, 127 S.Ct. 1105, 1107, 166 L.Ed.2d 956 (2007); *Grogan v. Garner*, 498 U.S. 279, 286, 287, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991).

Here, the "liquidation of the debtor's assets" element of the bankruptcy equation has been frustrated. Respondents do not dispute that they have received, post-petition, $17,424.75 of distributions from the Cheaters TV show. The bankruptcy court ordered, in the Turnover Order, that all such funds are property of the estate and must be turned over to the Petitioner. Respondents did not appeal or otherwise seek review of said Order.

By both the inherent power of all federal courts to sanction and deter bad faith and abusive conduct and by the broad authority given under 11 U.S.C. § 105, the bankruptcy court had the discretion to grant the trustee a surcharge against the Respondents' otherwise exempt property to the extent necessary to make the estate whole. Title 11 U.S.C. § 105 (a) provides:

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

In *Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365, 127 S.Ct. 1105, 166 L.Ed.2d 956 (2007), the Court considered whether such equitable powers were sufficient to authorize a bankruptcy court's immediate denial of a motion to convert a Chapter 7 case to a Chapter 13 case. At issue was the language of 11 U.S.C. § 706 (a) which provides:

> The debtor may convert a case under this chapter to a case under chapter 11, 12, or 13 of this title at any time, if the case has not been converted under section 1112, 1208, or 1307 of this title. Any waiver of the right to convert a case under this subsection is unenforceable.

In *Marrama*, even in the face of an express, arguably absolute, right to convert, the Court held that the debtor's bad faith was sufficient to justify the bankruptcy court's use of its broad equitable power to immediately deny the debtor's motion to convert his case to a case under Chapter 13. The Court stated:

> Nothing in the text of either § 706 or § 1307(c) (or the legislative history of either provision) limits the authority of the court to take appropriate action in response to fraudulent conduct by the atypical litigant who has demonstrated that he is not entitled to the relief available to the typical debtor. On the contrary, the broad authority granted to bankruptcy judges to take any action that is necessary or appropriate "to prevent an abuse of process" described in § 105(a) of the Code, is surely adequate to authorize an immediate denial of a motion to convert filed under § 706 in lieu of a conversion order that merely postpones the allowance of equivalent relief and may provide a debtor with an opportunity to take action prejudicial to creditors.
>
> Indeed, as the Solicitor General has argued in his brief amicus curiae, even if § 105(a) had not been enacted, the inherent power of every federal court to sanction "abusive litigation practices," see *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 765, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980), might well provide an adequate justification for a prompt, rather than a delayed, ruling on an

> unmeritorious attempt to qualify as a debtor under Chapter 13.

Marrama, at 127 S.Ct. 1111, 1112.

In *Latman v. Burdette*, 366 F.3d 774 (9th Cir.2004), the debtors failed to fully disclose the proceeds of personal property which they sold during the four days preceding their Chapter 7 bankruptcy filing. On motion of the trustee, the court ordered the debtors to account for the proceeds of the sales. The debtors provided an inaccurate accounting. Thereafter, the trustee filed a "Motion to Charge Debtors' Exemptions for Failure to Make Accounting and for Turnover of Property," wherein the trustee sought to surcharge the debtors' wildcard exemption for $7,000.00 which had not been turned over by the debtors. The bankruptcy court sustained the surcharge remedy which was later affirmed by the district court and the Ninth Circuit Court of Appeals.

The *Latman* court upheld the remedy of surcharge under the following analysis:

> The surcharge remedy fashioned by the bankruptcy judge prevented what would otherwise have been a fraud on the bankruptcy court . . .
>
> The surcharge remedy fashioned by the bankruptcy judge in response to the Trustee's motion did not "punish" the Latmans, as they contend, by denying them the full value of their statutory exemptions. Instead, the surcharge remedy protected the Latmans'

creditors by preventing the Latmans from sheltering more assets than permitted by 11 U.S.C. § 522. Before the Trustee's discovery of the Latmans' vehicle sales, and the monies allegedly in the La Jara account, the Latmans had already used the full value of their "wild card" exemption to exempt a minivan and an engagement ring. Had the Latmans also been permitted to retain the unaccounted-for proceeds from the sale of their car and boat, the Latmans would effectively have been exempting these funds as part of their "wild card" exemption, despite having already availed themselves of this exemption. In other words, they would have been protecting assets exceeding the permitted value of their statutory exemptions. The surcharge remedy simply ensured that [the] Latmans retained the full value, but no more than the full value, of their permitted exemptions.

. . . .

These cases demonstrate that bankruptcy courts do not view remedies similar to that sought by the Trustee against the Latmans, and given to the Trustee by the bankruptcy court, to be inequitable or contrary to the "fresh start" purposes underlying the Bankruptcy Code. We are of the same view. Under exceptional circumstances, such as those presented here, surcharge may be the only means fairly to ensure that debtors retain their statutory "fresh start," while also permitting creditors access to property in

> excess of that which is properly exempted under the Bankruptcy Code.
>
> . . . .
>
> We hold that the bankruptcy court may equitably surcharge a debtor's statutory exemptions when reasonably necessary both to protect the integrity of the bankruptcy process and to ensure that a debtor exempts an amount no greater than what is permitted by the exemption scheme of the Bankruptcy Code. Applying this rule, we conclude that in this case the bankruptcy court did not abuse its discretion in fashioning the surcharge remedy, and that the district court did not err in law by affirming it.

Id. at 785, 786.

In *In re Karl*, 313 B.R. 827 (Bankr.W.D.Mo. 2004), the bankruptcy court invoked the court's inherent power to sanction contempt. There, the debtors permitted their nephew to remove a pickup truck from the jurisdiction after filing their bankruptcy petition. The debtors then failed to comply with orders of the bankruptcy court for the recovery and surrender of the truck to the trustee. The Court then entered its Order to Show Cause as to why sanctions should not be imposed. The debtors did not appear at the show cause hearing. The bankruptcy court sanctioned the debtors ruling:

> In this case the Debtors have a principal residence valued at $78,000.00 in their schedules. The property is secured by a first

> mortgage of $58,000.00 and a second mortgage of $12,000.00. The Debtors claim the remaining $8,000.00 as an exempt homestead. Based on the Debtors' failure to timely turn over the 1997 pickup truck to the Trustee, the Court finds it appropriate to surcharge the Debtors' homestead exemption to the extent that the pickup has value and is property of the estate. In addition, the Court finds that the Trustee has needlessly expended attorney's time and fees in pursuit of the pickup truck based solely on the Debtors' obstinance. The Court will therefore award the Chapter 7 Trustee reasonable fees and costs from November 25, 2003, through the date the Court determines the characterization and value of the 1997 Ford pickup truck.

Id. at 832.

The *Karl* court explained the basis for the surcharge stating:

> When a debtor's contemptuous conduct involves the suppression of estate property, or when a debtor fails to adequately explain its loss, a court may surcharge the debtor's exemptions in an effort to prevent a fraud on the bankruptcy court and to protect creditors by preventing the debtor from sheltering more assets than permitted by the Bankruptcy Code. *Latman v. Burdette*, 366 F.3d 774, 784-85 (9th Cir. 2004). See also *In re Ward*, 210 B.R. 531, 537-38 (Bankr.E.D.Va. 1997) (allowing the trustee to "setoff" funds owing to the debtor from exempt property of

> the estate with property of the estate that the debtor was wrongfully retaining). Whether deemed a "surcharge" or a "setoff" the purpose is not to "punish" the debtor, but to reach an equitable result by preserving the spirit of the Bankruptcy Code and the creditors' reasonable expectations in the event of liquidation.

Id. at 831.

The BAP herein further found support in *In re Mazon*, 368 B.R. 906 (Bankr.M.D.Fla. 2007) (hereafter "*Mazon I*"). The *Mazon I* bankruptcy court found the surcharge to be an appropriate remedy under the court's broad authority to take such action as is necessary and appropriate to prevent an abuse of process and to make the estate whole. Though the district court later reversed relying upon the ruling of the Tenth Circuit Court of Appeals herein, as is discussed below *(In re Mazon*, ___ B.R. ___, 2008 WL 4234240 (M.D.Fla. 2008)) (hereafter "*Mazon II*"), the *Mazon I* bankruptcy court's opinion provides a well-reasoned analysis of a bankruptcy court's authority to surcharge exempt assets.

In *Mazon I,* the Trustee commenced an adversary proceeding seeking turnover of property from the debtors. In discovery the Trustee learned of several, very valuable unscheduled assets. Although the court awarded the Trustee annuities, an IRA and two investment businesses, the Trustee was unable to recover any of the investment business assets before they were dissipated by the Debtors. The investment

businesses consisted of brokerage services with a balance of $434,939.22 and real property sold post-petition for $181,196.23. *Id.* at 908.

Not having previously addressed the issue, the *Mazon I* court looked to other courts which had considered whether a trustee may surcharge exempt property. It noted:

> The Bankruptcy Code does not explicitly provide for the remedy of surcharge against a debtor's exemptions. *Latman v. Burdette*, 366 F.3d 774, 785 (9thCir.2004). However, the "broad authority granted to bankruptcy judges to take any action that is necessary or appropriate 'to prevent an abuse of process'" described in section 105 has been recently reaffirmed by the United States Supreme Court in the case of *Marrama v. Citizens Bank of Massachusetts* . . .
>
> The need to prevent abuse of the judicial system is all the more imperative in the bankruptcy context. As the Supreme Court has explained, bankruptcy courts "are courts of equity and 'appl[y] the principles and rules of equity jurisprudence.' . . . ("There is an overriding consideration that equitable principles govern the exercise of bankruptcy jurisdiction."); . . . ("Good sense and legal tradition alike enjoin that an enactment of Congress dealing with bankruptcy should be read in harmony with the existing system of equity jurisprudence of which it is a part."). Chief among these equitable principles and rules is the concept that a debtor who seeks

relief under the Bankruptcy Code must act in good faith and not for any improper purpose. As the Supreme Court has explained, "[o]nly exemplary motives and scrupulous good faith" can stir a court of equity to grant relief in bankruptcy. . . . the good faith standard "protects the jurisdictional integrity of the bankruptcy courts by rendering their powerful equitable weapons (i.e., avoidance of liens, discharge of debts, marshalling and turnover of assets) available only to those debtors and creditors with 'clean hands.'" . . . (citations omitted).

The Supreme Court has also recognized that bankruptcy courts have long relied upon their inherent equitable powers in passing on and preventing "a wide range of problems arising out of the administration of bankrupt estates." *Pepper [v. Litton]*, 308 U.S. [295] at 304, 60 S.Ct. 238[, 84 L.Ed. 281 (1939)]. Clearly, failure to disclose assets and the misappropriation of those assets falls squarely within the types of problems with which a bankruptcy court must be able to effectively deal.

. . . .

For these reasons, the Court concludes that it is within its discretion to exercise both the explicit grant of authority under section 105 and its inherent powers to surcharge the assets that the Debtors have claimed as exempt under Florida statutory exemptions.

In re Mazon, 368 B.R. at 909-911.

In the case at bar, the Bankruptcy Appellate Panel of the Tenth Circuit Court of Appeals first found that the bankruptcy court's Turnover Order implicitly determined that the Cheaters funds were property of the bankruptcy estate and were not exempt. Moreover, when Respondents failed to appeal the Turnover Order, that determination became the Law of the Case preventing them from later arguing that the Cheaters funds are exempt. *Scrivner v. Mashburn (In re Scrivner)*, 370 B.R. 346, 350, 351 (10thCir.BAP 2007). (App. 17, 23, 24). (Hereafter "*Scrivner I*").

Respondents next argued, under the Election of Remedies doctrine, that Petitioner's demand upon Cheaters for future payments to be made directly to the Trustee somehow caused a forfeiture of the right to collect the past payments from the Respondents. Respondents also claimed that the Surcharge Motion was procedurally flawed because the Petitioner served the motion rather than serving a summons which, they argued, was required under Fed.R.Bankr.P. 9014. The BAP rejected both arguments because they had not been raised in the bankruptcy court and further noted that Rule 9014(b) specifically calls for service of the "motion" rather than service of a summons. *Id.* at 370 B.R. 351. (App. 24).

As to the "crux" of this appeal: whether the bankruptcy court had authority to grant the Petitioner a surcharge against the Respondents' otherwise exempt property to the extent necessary to make the estate whole, the BAP held that it did, reasoning:

> Under 11 U.S.C. § 704(1) a Chapter 7 trustee is required to "collect and reduce to money the property of the estate. . . . " Likewise, a Chapter 7 debtor is required to "cooperate with the trustee as necessary to enable the trustee to perform the trustee's duties under this title" and "surrender to the trustee all property of the estate[.]"

Id. at 370 B.R. 351. (App. 25).

> To enforce these continuing obligations, a majority of courts hold that a bankruptcy court is empowered under § 105(a) to authorize the trustee to "surcharge" the debtor's exempt assets to compensate the estate for property of the estate which the debtor refuses to surrender. We agree. Section 105(a) provides that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." Section 704 and 521 of the Bankruptcy Code require the debtor to turn over property of the estate to a Chapter 7 trustee. **In authorizing a Chapter 7 trustee to enforce these obligations against exempt property, a bankruptcy court does nothing more than issue an order "that is necessary or appropriate to carry out the provisions" of the Bankruptcy Code. To that end, courts issuing surcharge orders are not using Section 105(a) in the abstract to create new law, but are using it to augment those obligations found elsewhere in the Bankruptcy Code.**

> The Court finds persuasive the analysis in *In re Mazon,* wherein the court explained that **concealing and failing to turn over assets to a Chapter 7 trustee is tantamount to claiming an additional and unauthorized exemption** "because the concealment and dissipation prevents administration of the assets by a trustee for the benefit of creditors." The *Mazon* court reasoned that a court's ability to issue surcharge orders is necessary to "prevent what would otherwise be a fraud on the court and on creditors caused by the debtor's failure to schedule and turn over estate assets."

Id. at 370 B.R. 351, 352. (App. 25-27). (citations omitted) (emphasis added).

The BAP further explained the manifest inadequacy of claimed specific statutory remedies to restore the estate's loss where a bankruptcy debtor takes bankruptcy estate funds and then simply refuses to obey the court's turnover order:

> As the Ninth Circuit Court of Appeals stated in *In re Latman*, . . . **revoking the debtor's discharge does little to benefit the estate. A debtor whose discharge is revoked is likely to be even more recalcitrant in responding to a trustee's efforts to recover property of the estate**. In contrast, surcharging a debtor's exemption is aimed at the administration of the estate only, and does not punish the debtor. In essence, surcharging the debtor's exempt

> property is a way to accomplish what the debtor was required to do in the first place-provide specific value to the estate. **Where the property withheld by the debtor is definite, there is no reason why a court cannot reach that same amount of exempt property. As the *Latman* court recognized, to hold otherwise would allow the debtor a windfall in that the debtor's recalcitrance would grant the debtor an avenue to steal from the estate.** The debtor would leave bankruptcy with exempt assets **plus** the assets which he or she failed to turn over to the trustee. This result would be inequitable and at odds with specific provisions of the Bankruptcy Code. **It is precisely the kind of situation § 105(a) was designed to remedy.**

Id. at 370 B.R. 352, 353. (App. 27-29). (citations omitted) (emphasis added).

> To that end, we agree with the holding of *Latman* and hold that a bankruptcy court may authorize a trustee to "surcharge" a debtor's exempt property to the extent necessary to make the estate whole where a debtor fails to turn over non-exempt property of the estate after being ordered to do so. A bankruptcy court authorizing a "surcharge" need not make a finding of fraud or hold the debtor in contempt. Of course, a court's use § 105(a) is discretionary and equitable in nature, so a "surcharge" should be authorized only where it is necessary to further the

> provisions of the Bankruptcy Code and where such an order is equitable.

Id. at 370 B.R. 353. (App. 25, 30).

Soon after *Scrivner I*, the Bankruptcy Appellate Panel of the Ninth Circuit Court of Appeals ruled in *Onubah v. Zamora (In re Onubah)*, 375 B.R. 549 (9thCir.BAP 2007) specifically approving of the surcharge rulings in *Latman*, *Karl*, and *Scrivner I.* In *Onubah*, the Chapter 7 trustee filed a motion for turnover of $96,000 in nonexempt proceeds generated upon sale of the debtor's residence. Though the residence and equity had been scheduled, the debtor refused to comply with the turnover order ultimately causing the estate to incur considerable delay, expense and attorneys' fees which depleted the recovered funds by approximately $59,418.18. *Id.* at 555.

The debtor in *Onubah* argued that his misconduct was different from the debtors' misconduct in *Latman* in that the debtors in *Latman* concealed assets and he did not. However the court in *Onubah* made it clear that concealment is not the touchstone of a surcharge remedy. The court stated:

> . . . *Onubah* argues that his misconduct is qualitatively different from the debtors' misconduct in *Latman*. They concealed assets; he did not.
>
> *Onubah's* interpretation of *Latman* is too narrow.
>
> The misconduct that led to the surcharge in *Latman* was not just the initial

> concealment of the $7,000. It was the debtor's failure to account for and turn over the money. *Latman*, 366 F.3d at 785.
>
> Although *Onubah* did not attempt to keep assets by concealing them from the Petitioner, his misconduct was to the same end. Even though he disclosed his residence, Onubah refused to turn it over so the trustee could sell it and realize the nonexempt equity for the benefit of creditors. He sought to keep that nonexempt equity for himself.

Id. at 554.

In re Ward, 210 B.R. 531 (Bankr.E.D.Va.1997) (relied upon in *Karl* as discussed above), was later referenced again in *In re Price*, 384 B.R. 407 (Bankr.E.D.Va. 2008). In *Price*, the trustee presented uncontroverted evidence of assets valued at $428,419.69 which were either unscheduled or unaccounted for and which did not come to light until nearly one and one-half years after the date of the petition. *Id.* at 409.

Following its prior ruling in *In re Ward* and the holdings in *Latman v. Burdette*, 366 F.3d 774 (9thCir. 2004) and *Scrivner I*, the court granted the trustee the alternative remedies of a setoff against debtors' receipt of their homestead exemption or a surcharge against the homestead exemption. *In re Price*, 384 B.R. 407 at 410, 411.

In stark contrast to the foregoing authorities are essentially two cases holding that bankruptcy courts

do not have authority to surcharge exempt assets to recover estate funds wrongfully withheld by debtors. The first is *Scrivner v. Mashburn (In re Scrivner)*, 535 F.3d 1258 (10thCir. 2008) (App. 1) (hereafter "*Scrivner II*"), and the second is *(In re Mazon*, ___ B.R. ___, 2008 WL 4234240 (M.D.Fla. 2008)) (hereafter "*Mazon II*"). In addition to running counter to the overwhelming majority of courts, indeed apparently counter to all other courts which counsel for Petitioner has located that address the issue of surcharging exempt assets, the Tenth Circuit Court of Appeals has simply misread the provisions of the Bankruptcy Code upon which its opinion is grounded and *Mazon II* builds its ruling upon the opinion in *Scrivner II* or, at least, upon a repetition of the arguments stated in *Scrivner II*.

Recognizing the gravity of allowing the Respondents to profit from their defiance of the bankruptcy court's direct order, the Tenth Circuit concedes the inequity of the Respondents' position stating:

> As these cases illustrate, when the debtor conceals or fails to surrender assets belonging to the estate, the arguments supporting a surcharge of exempt assets are compelling. Here, the debtors failed to follow a court order requiring the surrender of their post-petition Cheaters distributions. **Allowing the debtors to keep the full value of their exempt assets, when they have kept or converted assets belonging to the estate, arguably gives the debtors**

> **an undeserved benefit at the expense of the estate and the creditors.**

Scrivner II, 535 F.3d at 1264. (App. 8) (emphasis added).

The court states "***[g]enerally***, if the debtor claims property as exempt and 'a party in interest' does not object, that property is exempt from property of the estate." *Id.* at 1264. (App. at 9) (emphasis added). This, however, simply restates a facet of the underlying question. The very nature of the surcharge remedy assumes that the court is allowing the trustee to attach some or all of what would otherwise be exempt property to avoid, as discussed above, what would otherwise allow a debtor to shelter more value than would otherwise be permitted by applicable exemption laws.

At this point, the Tenth Circuit veers off course stating:

> . . . the Code contains a limited number of exceptions to the rule that exempted property cannot be used to satisfy **pre-petition debts** or **administrative expenses**. See § 522(c), (k). These enumerated exceptions do not include a surcharge of exempt property for failure to turn over estate property. Because the Code contains explicit exceptions to the general rule placing exempt property beyond the reach of the estate, we may not read additional exceptions into the statute. See *TRW, Inc. v. Andrews*, 534 U.S. 19, 28, 122 S.Ct. 441, 151 L.Ed.2d 339 (2001)

> ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent. (quotation omitted)); see also *In re Sadkin*, 36 F.3d 473, 478 (5thCir.1994) ("Section 105(a) does not allow the bankruptcy court to override explicit mandates of other sections of the Bankruptcy Code." (quotation omitted)).

Scrivner II, 535 F.3d at 1264. (App. 9, 10) (emphasis added).

As is clear from the rule argued by the Tenth Circuit and the cited Bankruptcy Code sections, the enumerated exceptions have no application to the liability of otherwise exempt property for debts arising **after** commencement of the case or for payment of debts that are **not administrative expenses**.

> Title 11 U.S.C. § 522 provides:
>
> . . . .
>
> (c) Unless the case is dismissed, property exempted under this section is not liable during or after the case for any debt of the debtor that arose, or that is determined under section 502 of this title as if such debt had arisen, **before the commencement of the case**, except –
>
> . . . .

> (k) Property that the debtor exempts under this section is not liable for payment of any **administrative expense** except – . . .

(Emphasis added).

It is undisputed that the debt owed to the estate by Respondents is a **postpetition debt** for postpetition distributions from Cheaters. It is likewise undisputed that this debt is **not an administrative expense**.

Therefore, the explicit exceptions enumerated under 11 U.S.C. § 522(c) and 11 U.S.C. § 522(k) are not enumerated exceptions having any application or relevance to enforcement of a trustee's action to recover property of the estate or enforcement of a bankruptcy court's turnover order. Consequently, allowing the bankruptcy court to exercise its discretion to surcharge a debtor's exempt assets could not possibly result in reading an additional exception into either the rule that exempt property is not liable for debts arising before the commencement of the case or the rule that exempt assets are not liable for payment of administrative expenses.

Finally, the court in *Scrivner II* argues that the Bankruptcy Code provides other remedies for a debtor's failure to turnover property. In the first instance, the fundamental purpose of 11 U.S.C. § 105 is to grant the bankruptcy court the authority to issue *additional* orders, processes or judgments as necessary or appropriate to carry out the specific provisions of the Bankruptcy Code and to prevent an

abuse of process. Moreover, no court has argued that the remedies set out by the Tenth Circuit Court of Appeals are intended to be exclusive remedies.

Indeed, contrary to the court's argument, the case at bar is a glaring example of the inadequacy of non-surcharge remedies to make the estate whole. The Petitioner has obtained a turnover order yet Respondents have refused to comply – and indeed took over $13,000.00 of estate funds after receiving notice of the motion for turnover. Petitioner filed a motion for contempt in addition to the surcharge motion – yet Respondents paid nothing.[2] Petitioner filed an adversary proceeding and has now revoked the Respondents' discharge – yet respondents have paid nothing. And finally, contrary to the argument of the Tenth Circuit, dismissal of a bankruptcy case is often the very thing a debtor wants most when faced with the realization that there are significant assets that are going to be administered by the trustee. As *Latman, Karl*, the BAP opinion herein and other authorities discussed above set out, though there are a multitude

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[2] The Tenth Circuit stated that "by filing the motion [for order of contempt], the trustee did not follow the proper procedure of commencing an adversary proceeding. Both a proceeding to revoke a discharge and a proceeding to obtain equitable relief (i.e., sanctions) are adversary proceedings." *Scrivner II*, 535 F.3d at 1265, n.3. (App. 11). To the contrary, though a contempt action may also be brought by adversary proceeding, Fed.R.Bankr.P. 9020 provides: "Rule 9014 [Contested Matters] governs a *motion* for an order of contempt made by the United States trustee or a party in interest." (emphasis added).

of punitive remedies available to the courts and trustees, the surcharge uniquely targets the goal of making the estate whole.

Nevertheless, the Tenth Circuit Court of Appeals has overruled the bankruptcy court's surcharged based upon an erroneous interpretation of 11 U.S.C. § 522(c) and 11 U.S.C. § 522(k). In fact, surcharging the Respondents' otherwise exempt assets does not conflict with any other provision of the Bankruptcy Code and does not expand upon any explicit exceptions enumerated under the Code.

Following the ruling in *Scrivner II,* the appeal of the bankruptcy court ruling from *Mazon I* was concluded. In *In re Mazon*, ___ B.R. ___, 2008 WL 4234240 (M.D.Fla. 2008) (*"Mazon II"*), the District Court for the Middle District of Florida noted the two conflicting decisions of *Latman* and, more recently, *Scrivner II*. Choosing to follow the ruling in *Scrivner II,* the *Mazon II,* court stated:

> The [*Scrivner II*] Court stated that . . . because the Bankruptcy Code contains explicit exceptions to the general rule placing exempt property beyond the reach of the bankruptcy estate, and contains specific remedies other than a surcharge for a debtor's failure to turn over estate property to the trustee, a bankruptcy court may not read additional exceptions or remedies into the statute. . . .
>
> . . . as *Scrivner* noted, the Bankruptcy Code contains express exceptions to the rule that

> exempted property cannot be used to satisfy pre-petition debts or administrative expenses, and therefore a court may not read additional exceptions such as a surcharge into the statute.

Mazon II, at *5, 6.

As is obvious from the ruling in *Mazon II*, the court there followed the incorrect reading of 11 U.S.C. § 522(c) and (k) by the *Scrivner II* court. As a result, the surcharge was denied and apparently the assets subject to the surcharge order in that estate have been released.

At the Circuit Court level, only the Tenth Circuit and Ninth Circuit courts have spoken to the question of whether bankruptcy courts have authority to grant trustees a surcharge against debtors' otherwise exempt property. Each have reached opposite opinions. In addition to being an issue of great magnitude in itself, the conflict between the Circuits presents an unbearable uncertainty for trustees and the courts. While trustees are under a duty to pursue all reasonable means to recover property of the estate, a cloud of uncertainty now covers all surcharge orders, even in Circuits previously allowing them.

CONCLUSION

For the reasons stated above, this Court should grant the petition for writ of certiorari, reverse the judgment of the Tenth Circuit Court of Appeals and remand with instructions consistent with the opinions and rulings of the Bankruptcy Appellate Panel of the Tenth Circuit Court of Appeals and the United States Bankruptcy Court for the Western District of Oklahoma.

Respectfully submitted,

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

IN RE: TOBY SCRIVNER and ANGELIQUE PISANO,

Debtors.

TOBY SCRIVNER and ANGELIQUE PISANO,

Appellants,

v.

JOHN D. MASHBURN, Trustee,

Appellee.

No. 07-6167

(Filed Aug. 8, 2008)

APPEAL FROM UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE TENTH CIRCUIT (BAP No. WO-06-122)

Submitted on the briefs:*

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* After receiving briefing in this case, this three-judge panel granted the Appellant's unopposed motion to waive oral argument. The case is therefore submitted for disposition on the briefs. See Fed. R. App. P. 34(f); 10th Cir. R. 34.1(A)(2), (G).

Sam George Caporal and Mark W. Hayes, Oklahoma City, Oklahoma, for the Appellants.

John Mashburn, Trustee, Garvin, Agee, Carlton & Mashburn, P.C., Edmond, Oklahoma, for the Appellee.

Before **TACHA**, **BRISCOE**, and **HARTZ**, Circuit Judges.

TACHA, Circuit Judge.

Toby Scrivner and Angelique Pisano (the "debtors") appeal from the judgment of the Bankruptcy Appellate Panel ("BAP") affirming the bankruptcy court's authorization of a surcharge of their exempt property. Exercising jurisdiction pursuant to 28 U.S.C. § 158(d)(1), we REVERSE the BAP's judgment and the bankruptcy court's order authorizing the surcharge of the debtors' exempt assets.

I. BACKGROUND

On October 14, 2005, the debtors filed a Chapter 7 petition for bankruptcy. In their schedule of assets, the debtors disclosed a 0.5% ownership interest in a television show called "Cheaters." They also reported that this interest produces "a monthly income ranging from $700 to $1,700," and they did not claim this income as exempt in their schedule of assets. In

addition, the debtors did not surrender the monthly income from their interest in Cheaters to the trustee.

In March 2006, the bankruptcy court granted the debtors a discharge. After the debtors received the discharge, the trustee filed a motion to compel the turnover of the Cheaters distributions. The bankruptcy court granted the motion in an order requiring the debtors to turn over the post-petition income generated by their interest in Cheaters. The debtors did not appeal the order, and they did not surrender any of the post-petition Cheaters income.

Beginning in June 2006, after delivering a copy of the court's turnover order to the Cheaters's producers, the trustee began receiving the debtors' distributions from their interest in Cheaters directly from the producers. In order to recover post-petition distributions prior to June 2006, the trustee filed a motion for an order of contempt and to surcharge the debtors' exemptions in the amount of $17,424.75 plus interest, costs, and attorneys' fees. In response, the debtors argued that, because the court had already granted them a discharge, the trustee could not ask the court to compel the turnover of estate property. In addition, they argued that their exemptions are protected from surcharge by state and federal law. They also argued – for the first time – that the Cheaters distributions are exempt property under Oklahoma law and therefore not estate property subject to turnover. They did not, however, file an amendment to their schedule of assets to claim the Cheaters distributions as exempt.

On October 24, 2006, the bankruptcy court issued an order granting the trustee's motion to surcharge the debtors' exemptions. The court ordered the debtors to turn over to the trustee $17,424.75 plus interest and $1300 in attorneys' fees by November 6, 2006. In the event the debtors failed to surrender the funds, the court order gave the trustee the authority to surcharge the debtors' exemptions, including the debtors' retirement funds, to the extent necessary to satisfy the entire amount owed to the trustee. The court further held that the debtors are responsible for any taxes, penalties, or fees incurred in withdrawing or borrowing money from their retirement accounts.

The debtors appealed the bankruptcy court's order to the BAP, which affirmed – by a vote of two to one – the bankruptcy court's decision to authorize the surcharge of the debtors' exemptions. In addition, all three judges rejected the debtors' argument that the bankruptcy court erred in ordering the turnover of the Cheaters income because it is exempt under state law. Although one judge simply noted that this property is not exempt, the BAP majority refused to consider the debtors' exemption argument, holding that the bankruptcy court's implicit determination that the Cheaters income is estate property became the law of the case when the debtors did not appeal the turnover order. The debtors appeal the BAP's judgment affirming the bankruptcy court's authorization of the surcharge,[1] as well as the BAP's refusal

[1] The trustee contends that the debtors did not challenge below the bankruptcy court's equitable authority to surcharge

(Continued on following page)

to decide whether the Cheaters distributions are exempt.

II. DISCUSSION

Although this is an appeal from a BAP decision, we independently review the decision of the bankruptcy court. *See In re Warren,* 512 F.3d 1241, 1248 (10th Cir. 2008) (explaining that by independently reviewing the bankruptcy court's decision, "we treat the BAP as a subordinate appellate tribunal whose rulings are not entitled to any deference (although they certainly may be persuasive)"). We review questions of law de novo and the bankruptcy court's factual findings for clear error. *Id.*

A. The Bankruptcy Court's Authorization of the Surcharge of Exempt Assets

The bankruptcy court authorized the surcharge against the debtors' exempt assets pursuant to its equitable powers. A bankruptcy court's equitable powers are codified in 11 U.S.C. § 105(a). *See In re Alderete,* 412 F.3d 1200, 1206 (10th Cir. 2005) ("Section 105(a) of the Bankruptcy Code establishes the equitable powers of the bankruptcy court."). This section provides:

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exempt assets. But the bankruptcy court and the BAP have both considered the matter, it has been briefed by the opposing parties in this court, and it is one of great importance to bankruptcy law. We therefore deem it appropriate for us to address it.

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

§ 105(a). We have held, for example, that this provision grants bankruptcy courts the power to "sanction conduct abusive of the judicial process," *see In re Courtesy Inns, Ltd.*, 40 F.3d 1084, 1089 (10th Cir. 1994), and to correct their own mistakes, *see In re Themy*, 6 F.3d 688, 689-90 (10th Cir. 1993). Moreover, § 105(a) grants bankruptcy courts the power to enjoin particular actions that will interfere with a debtor's bankruptcy case. *See In re Western Real Estate Fund, Inc.*, 922 F.2d 592, 601 (10th Cir. 1990) (per curiam) (noting that "a temporary stay prohibiting a creditor's suit against a nondebtor . . . may be permissible").

We have repeatedly emphasized, however, that a bankruptcy court may not exercise its "broad equitable powers" under § 105(a) "'in a manner that is inconsistent with the other, more specific provisions of the [Bankruptcy] Code.'" *In re Frieouf*, 938 F.2d 1099, 1103 n.4 (10th Cir. 1991) (quoting *In re Western Real Estate Fund, Inc.*, 922 F.2d at 601). In other words, a bankruptcy court's exercise of its authority under § 105(a) may not contravene or disregard the plain language of a statute. *See, e.g., In re Alderete,*

412 F.3d at 1207 (holding that the bankruptcy court lacked the power under § 105(a) to grant the partial discharge of student loan debt when the debtor did not show undue hardship as required by statute); *In re Tuttle,* 291 F.3d 1238, 1245 (10th Cir. 2002) (noting that even though the debtor's "equitable arguments [under § 105(a)] are compelling, they cannot overcome the plain language of the Code"). As we have previously noted, "[t]o allow the bankruptcy court, through principles of equity, to grant any more or less than what the clear language of [a statute] mandates would be tantamount to judicial legislation and is something that should be left to Congress, not the courts." *In re Alderete,* 412 F.3d at 1207 (quotation omitted).

In the present case, we must therefore decide whether the bankruptcy court's authorization of the surcharge of exempt assets is consistent with other provisions of the Bankruptcy Code. This is a question of first impression for our court, and only one other circuit has decided whether a bankruptcy court may use its equitable powers to surcharge a debtor's exempt assets when the debtor fails to turn over estate property. In *Latman v. Burdette,* 366 F.3d 774 (9th Cir. 2004), the Ninth Circuit held that the surcharge of a debtor's exempt assets may be an appropriate remedy "when reasonably necessary both to protect the integrity of the bankruptcy process and to ensure that a debtor exempts an amount no greater than what is permitted by the exemption scheme of the Bankruptcy Code." *Id.* at 786. As the *Latman*

court noted, *id.* at 785-86, a number of bankruptcy courts have reached the same conclusion. *See, e.g.*, *In re Mazon,* 368 B.R. 906, 910 (Bankr. M.D. Fla. 2007) (noting that the remedy of surcharge "prevent[s] what would otherwise be a fraud on the court and on creditors caused by the debtor's failure to schedule and turn over estate assets"); *In re Karl,* 313 B.R. 827, 831 (Bankr. W.D. Mo. 2004) (explaining that the surcharge remedy preserves "the spirit of the Bankruptcy Code and the creditors' reasonable expectations in the event of liquidation").

As these cases illustrate, when the debtor conceals or fails to surrender assets belonging to the estate, the arguments supporting a surcharge of exempt assets are compelling. Here, the debtors failed to follow a court order requiring the surrender of their post-petition Cheaters distributions. Allowing the debtors to keep the full value of their exempt assets, when they have kept or converted assets belonging to the estate, arguably gives the debtors an undeserved benefit at the expense of the estate and the creditors.[2]

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[2] Citing Fed. R. Bankr. P. 4004, the debtors argue that the trustee may not seek the turnover of estate property after a debtor is granted a discharge. This argument is without merit. Rule 4004 specifies when complaints objecting to discharge may be filed and when the court may grant a discharge; it does not limit the trustee's ability to administer the estate after discharge or otherwise modify a trustee's duty to collect estate property in a Chapter 7 bankruptcy. *See* 11 U.S.C. § 704(a)(1) (requiring trustee to "collect and reduce to money the property of

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But although we recognize this concern, we are not at liberty "to grant any more or less than what the clear language of [the Bankruptcy Code] mandates." *In re Alderete,* 412 F.3d at 1207 (quotation omitted). The Code contains specific provisions governing exemptions. *See* 11 U.S.C. § 522. Generally, if the debtor claims property as exempt and "a party in interest" does not object, that property is exempt from property of the estate. *See* § 522(*l*); *see also* Fed. R. Bankr. P. 4003. Furthermore, the Code contains a limited number of exceptions to the rule that exempted property cannot be used to satisfy pre-petition debts or administrative expenses. *See* § 522(c), (k). These enumerated exceptions do not include a surcharge of exempt property for failure to turn over estate property. Because the Code contains explicit exceptions to the general rule placing exempt property beyond the reach of the estate, we may not read additional exceptions into the statute. *See TRW, Inc. v. Andrews,* 534 U.S. 19, 28 (2001) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." (quotation omitted)); *see also In re Sadkin,* 36 F.3d 473, 478 (5th Cir. 1994) ("Section 105(a) does not allow the bankruptcy court to

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the estate"); *see also id.* § 542(a) (requiring turnover of estate property to trustee); *id.* § 554(d) (stating that property that is not abandoned or administered remains estate property).

override explicit mandates of other sections of the Bankruptcy Code." (quotation omitted)).

The Code also contains specific remedies for a debtor's failure to turn over estate property to the trustee as required by 11 U.S.C. § 521(a)(4). For example, if the debtor destroys or conceals estate property with the intent to hinder or defraud a creditor or officer of the estate, the debtor may be denied a discharge. *Id.* § 727(a)(2). The court may also deny a discharge if the debtor has refused to obey a lawful court order. *Id.* § 727(a)(6). Similarly, other provisions addressing debtor misconduct contemplate specific remedial action on the part of the trustee and court. For example, § 707 authorizes the dismissal of a Chapter 7 case for cause, including "unreasonable delay by the debtor that is prejudicial to creditors." *Id.* § 707(a)(1).

Most salient for purposes of this case, the trustee may request that the court revoke a discharge if the debtor has refused to obey a court order. *Id.* § 727(d)(3). In a Chapter 7 case, the debtor is often able to obtain a discharge early in the case. *See* Fed. R. Bankr. P. 4004(a), (c) (requiring court to grant a discharge sixty days after the first date set for the meeting of creditors if certain conditions are satisfied). The provisions governing revocation of a discharge allow the debtor to receive an early discharge while protecting the estate and creditors from debtor misconduct post-discharge. *See* 6 Collier on Bankruptcy ¶ 727.15 (15th ed. rev.). The trustee in this case is apparently pursuing this very remedy, having

commenced an adversary proceeding in the bankruptcy court to revoke the debtors' discharge.[3]

In short, because the surcharge of exempt property is inconsistent with the Code's provisions governing exemptions and debtor misconduct, it is beyond the scope of a bankruptcy court's equitable authority under § 105(a). Section 105(a) does not empower courts to create remedies and rights in derogation of the Bankruptcy Code and Rules. *See In re Alderete,* 412 F.3d at 1207; *see also United States v. Sutton,* 786 F.2d 1305, 1308 (5th Cir. 1986) (explaining that § 105(a) "does not authorize the bankruptcy courts to create substantive rights that are otherwise unavailable under applicable law, or constitute a roving commission to do equity" (footnote omitted)). We therefore hold that the bankruptcy court exceeded its equitable authority under § 105(a) in authorizing the surcharge of the debtors' exempt assets.

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[3] In addition to revoking the debtors' discharge, the court can impose sanctions for civil contempt. *See In re Skinner,* 917 F.2d 444, 447 (10th Cir. 1990) (holding that § 105 authorizes bankruptcy courts to impose sanctions for civil contempt to compel compliance with a court order or compensate parties for losses caused by noncompliance). In this case, the trustee filed a motion for an order of contempt, which the court did not address. We note, however, that by filing the motion, the trustee did not follow the proper procedure of commencing an adversary proceeding. Both a proceeding to revoke a discharge and a proceeding to obtain equitable relief (i.e., sanctions) are adversary proceedings. *See* Fed. R. Bankr. P. 7001(4), (7).

B. The Debtors' Argument that the Cheaters Income Is Exempt

The debtors also argue that they have no duty to turn over the post-petition Cheaters distributions because they are exempt under state law. They first raised this argument in response to the trustee's motion for an order of contempt and to surcharge the debtors' exemptions, but the bankruptcy court did not address it. The debtors raised it again in their appeal to the BAP, but the BAP majority held that it could not consider the argument because the bankruptcy court's implicit determination that the distributions are estate property became the law of the case when the debtors did not appeal the earlier turnover order.

The doctrine of the law of the case "posits that '[w]hen a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.'" *See Mason v. Texaco, Inc.*, 948 F.2d 1546, 1553 (10th Cir. 1991) (quoting *Arizona v. California*, 460 U.S. 605, 618 (1983)). In addition, the doctrine "requires every court to follow the decisions of courts that are higher in the judicial hierarchy." *Guidry v. Sheet Metal Workers Int'l Assoc.*, 10 F.3d 700, 705 (10th Cir. 1993), *aff'd in part and rev'd in part, Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 39 F.3d 1078 (10th Cir. 1994) (en banc). Because the bankruptcy court did not depart from one of its own rulings or the ruling of a higher court in the same case, the doctrine of the law of the case arguably does not apply here. *Cf. Been v. O.K. Indus., Inc.*, 495 F.3d 1217, 1224-25 (10th Cir. 2007)

(holding that district court did not abuse its discretion in reconsidering a prior interlocutory ruling).

The BAP concluded, however, that the bankruptcy court implicitly decided that the Cheaters distributions are not exempt in its earlier turnover order, and this decision became the law of the case when the debtors did not appeal the order. *See Concrete Works of Col., Inc. v. City & County of Denver,* 321 F.3d 950, 992 (10th Cir. 2003) (noting that a "legal decision made at one stage of litigation, unchallenged in a subsequent appeal when the opportunity to do so existed, becomes the law of the case for future stages of the same litigation, and the parties are deemed to have waived the right to challenge that decision at a later time" (quotation omitted)). But the law of the case should not constrain appellate review of a lower court's decision unless a party fails to challenge that decision in an *actual* appeal. *See id.* at 992-93; *see also Capps v. Sullivan,* 13 F.3d 350, 353 (10th Cir. 1993) (declining to review an issue because the parties did not contest it in their prior appeal); *Laffey v. Nw. Airlines, Inc.,* 740 F.2d 1071, 1090 (D.C. Cir. 1984) (explaining that when a party fails to challenge a decision in its first appeal, that appeal affirms the lower court's decision for purposes of the law of the case). If no appeal is taken, as was the case here, the apposite doctrine is that of issue preclusion. *See generally* Charles Alan Wright et al., 18A Federal Practice and Procedure § 4433 (2d ed. 2002); *see also id.* 18B Federal Practice and Procedure § 4478.6, at

819 ("If no one appeals on any issue, the judgment of the trial court moves into the realm of res judicata.").

The doctrine of issue preclusion "comes into play when an issue involved in a prior decision is the same issue involved in a subsequent action." *See Mabry v. State Bd. of Community Colleges & Occupational Educ.*, 813 F.2d 311, 316 (10th Cir. 1987). If the bankruptcy court's turnover order, which the debtors did not appeal, "actually and necessarily decided" the exemption issue, principles of issue preclusion could prevent the debtors from raising this argument in an appeal from a subsequent order. *See id.* (noting that issue preclusion does not apply unless "the issue is actually decided in the first action" and "it was necessary to decide the issue in disposing of the first action"); *see also In re Albrecht,* 233 F.3d 1258, 1260-61 (10th Cir. 2000) (holding that, under the doctrine of direct estoppel, a law firm's failure to appeal the bankruptcy court's earlier order barred it from challenging the court's holding on its appeal from a subsequent order); *Turshen v. Chapman,* 823 F.2d 836, 839 (4th Cir. 1987) (holding that a debtor could not relitigate the claim that the trustee breached his fiduciary duty because the bankruptcy court had already held that the trustee's actions were not improper).

We recognize, however, that the BAP's application of the law-of-the-case doctrine has some support in our case law. On at least one occasion, we have applied the law-of-the-case doctrine, rather than issue preclusion, to prevent a party from raising an

issue when the party failed to appeal an earlier order deciding the issue. *See Martinez v. Roscoe,* 100 F.3d 121, 123 (10th Cir. 1996). We need not determine, however, whether this decision is in conflict with our other precedent because the debtors have not taken the necessary steps to claim this exemption.

Under the Code, it is the debtor's responsibility to claim all exemptions. *See* § 522(*l*); Fed. R. Bankr. P. 4003(a). Unless a debtor claims an exemption, the property remains property of the estate. *See In re Yonikus,* 974 F.2d 901, 905 (7th Cir. 1992) ("All property the debtor owns at the time the bankruptcy petition is filed becomes property of the bankruptcy estate. Rather than withholding property from the estate, the debtor actually seeks a return of the property from the estate by filing the claim for exemption." (citation omitted)). In order to claim an exemption, the debtors must list the exempt property in their schedule of assets. *See* § 522(*l*); Fed. R. Bankr. P. 4003. They did not, however, claim the Cheaters distributions as exempt property in their schedule of assets, and they have not filed an amendment to claim the exemption. *See* Fed. R. Bankr. P. 1009(a).

Because the debtors did not claim an exemption, the bankruptcy court did not consider the question of whether the distributions are exempt under state law when it resolved the trustee's turnover motion. Thus, we disagree with the BAP's conclusion that the bankruptcy court implicitly determined that the distributions are estate property. Rather, the bankruptcy

court treated the funds as estate property because the debtors had not properly claimed an exemption.

III. CONCLUSION

Accordingly, we REVERSE the BAP's judgment and the bankruptcy court's order authorizing the surcharge of the debtors' exempt assets. We also DENY the trustee's request for attorneys' fees and costs on appeal.

PUBLISH

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE TOBY SCRIVNER and ANGELIQUE PISANO, Debtors.	BAP No. WO-06-122
TOBY SCRIVNER and ANGELIQUE PISANO, Appellants, v. JOHN D. MASHBURN, Trustee, Appellee.	Bankr. No. 05-30226-WV Chapter 7 OPINION (Filed Jun. 20, 2007)

Appeal from the United States Bankruptcy Court for the Western District of Oklahoma

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Submitted on the briefs:*

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* The parties did not request oral argument, and after examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R.

(Continued on following page)

Sam George Caporal and Mark W. Hayes, Oklahoma City, Oklahoma, for the Appellants.

John D. Mashburn, pro se.

Before McFEELEY, Chief Judge, CLARK, and THURMAN, Bankruptcy Judges.

THURMAN, Bankruptcy Judge.

Toby Scrivner and Angelique Pisano (the "Debtors") appeal an order authorizing the trustee to "surcharge" the Debtors' exempt assets to collect the value of property of the estate not turned over pursuant to an earlier court order. For the reasons stated below, the decision of the bankruptcy court is AFFIRMED.

I. FACTUAL BACKGROUND

The Debtors filed for Chapter 7 bankruptcy relief on October 14, 2005. John Mashburn, the Appellee in this case, was appointed the Chapter 7 trustee (the "Trustee"). At the time of filing, the Debtors' only significant source of income was funds received each month for a .5% interest in a television show called "Cheaters," which they disclosed on their Bankruptcy

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Bankr. P. 8012. The case is therefore ordered submitted without oral argument.

Schedules. They did not initially claim an exemption for their interest in Cheaters, and on June 1, 2006, after notice and hearing, the bankruptcy court issued an Order Granting Trustee's Motion to Turn Over (the "Turnover Order") requiring the Debtors to turn over the income received from Cheaters post-petition (the "Cheaters Funds").[1]

The Debtors did not appeal the Turnover Order and failed to surrender the Cheaters Funds (approximately $17,000), some $13,000 of which was received after the Debtors received notice of the Trustee's Turnover Motion. In response, the Trustee served the producer of Cheaters with a copy of the Turnover Order and demanded that Cheaters begin paying the monthly payments directly to the Trustee. The Trustee also filed a Motion for Contempt and to Surcharge Debtor's Exemptions (the "Surcharge Motion"). The Debtors filed a written objection and the Court conducted a contested hearing on the Surcharge Motion on October 17, 2006, upon proper notice.[2] The

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[1] It appears from the record submitted on appeal that the first time the Debtors asserted an exemption in the income received from Cheaters was in response to the Trustee's Motion to Surcharge exempt assets, filed after the Debtors failed to comply with the Turnover Order. It does not appear that the Debtors have amended their Bankruptcy Schedules to formally claim this exemption.

[2] *See* Response to Trustee's Motion for Order of Contempt and Motion to Surcharge Debtor's [sic] Exemptions for Failure to Comply with Order for Turnover Brief in Support, *in* Appellant's [sic] Appendix at 78.

bankruptcy court issued an Order granting the Surcharge Motion (the "Surcharge Order") on October 24, 2006. Specifically, the bankruptcy court ordered the Debtors to surrender and turn over to the Trustee $17,424.75 plus interest and $1,300 as a "reasonable attorney fee incurred by the Trustee in bringing this Motion."

The Order further provided:

> 5. In the event said funds are not delivered to the Trustee by November 6, 2006, then the Trustee may surcharge and is hereby granted a surcharge against the Debtors' exempt property, including Debtors' retirement funds, to the extent necessary to satisfy the sums owed under paragraphs 1 through 3 above.
>
> 6. Said surcharge shall be in the amount necessary to net to the Estate and Trustee the payment of the sums owed under paragraphs 1 through 3 above and that any taxes, penalties or fees incurred by reason of the withdrawal or borrowing of said retirement accounts shall be born by the Debtors. The Estate and Trustee shall bear such tax liability as would have been incurred for receipt of the distributions from Debtors' ownership of the Limited Partnership in the Cheaters LLC TV Show as if such funds had been

> turned over to the Trustee without surcharge of the exempt assets.[3]

The Debtors failed to pay the Cheaters Funds to the Trustee by November 6, 2006.

The Debtors timely appeal the Surcharge Order, arguing that the funds at issue are exempt under Oklahoma law, that the bankruptcy court lacked authority to surcharge their exempt property, and that the bankruptcy court followed improper procedure in considering and issuing the Surcharge Order.[4]

II. JURISDICTION

This Court has jurisdiction to hear timely appeals from final judgments, orders, and decrees of bankruptcy courts within the Tenth Circuit, unless one of the parties elects to have the appeal heard by a district court.[5] Neither party elected to have this

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[3] Order on Trustee's Motion for Order of Contempt and Motion to Surcharge Debtors' Exemptions for Failure to Comply with Order for Turnover at 2, *in* Appellant's [sic] Appendix at 88.

[4] The Debtors' Notice of Appeal refers to an order issued on October 17, 2006 requiring the "turnover of $17,424.75." Appellant's Appendix at 90. Because the original Turnover Order was issued on June 1, 2006, and the Debtors' Statement of Issues encompasses the merits of the Surcharge Order, the Court treats this appeal as relating to the Surcharge Order only, issued on October 24, 2006.

[5] 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8002.

appeal heard by the United States District Court for Western District of Oklahoma.

A decision is considered final if it "disposes of a particular adversary proceeding or discrete controversy pursued within the broader framework cast by the petition."[6] In this case, the Surcharge Order ended the controversy of the Trustee's attempts to recover the Cheaters Funds. Thus, the Surcharge Order is a final order and the Court determines that jurisdiction over this appeal is appropriate.

III. ANALYSIS

A. Standard of Review

None of the factual determinations underlying the Surcharge Order are in dispute. The Court will review the bankruptcy court's authority to issue the Surcharge Order under *de novo* review,[7] and will review the bankruptcy court's decision to apply that authority for an abuse of discretion.[8]

B. Propriety of the Turnover Order

At the outset, the Debtors argue that the bankruptcy court abused its discretion in ordering them to

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[6] *In re Am. Ready Mix, Inc.*, 14 F.3d 1497, 1499 n.2 (10th Cir. 1994) (internal quotation marks omitted).

[7] *Elder v. Holloway*, 510 U.S. 510, 516 (1994).

[8] *Nardei v. Maughan (In re Maughan)*, 340 F.3d 337, 344 (6th Cir. 2003).

turn over the income received from Cheaters because they believe that those funds are exempt. The Trustee argues that the Debtors are barred by the doctrine of Law of the Case from arguing their right to assert an exemption in the Cheaters funds. We agree.

Under the doctrine of Law of the Case, "'[a] legal decision made at one stage of litigation, unchallenged in a subsequent appeal when the opportunity to do so existed, becomes the law of the case for future stages of the same litigation, and the parties are deemed to have waived the right to challenge that decision at a later time.'"[9] "The doctrine applies to issues previously decided, either explicitly or by necessary implication."[10] A debtor's entitlement to an exemption is a question of law.[11]

In the course of issuing the Turnover Order, the bankruptcy court implicitly determined that the Cheaters Funds were property of the estate and not exempt from the Trustee's administration in this case. The Debtors did not appeal the Turnover Order so the determination that the Cheaters funds were property of the estate became Law of the Case. The Debtors may not argue the merits of the legal

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[9] *Concrete Works of Colo., Inc. v. City and County of Denver*, 321 F.3d 950, 992 (10th Cir. 2003) (quoting *Capps v. Sullivan*, 13 F.3d 350, 353 (10th Cir. 1993)).

[10] *Guidry v. Sheet Metal Workers Int'l Ass'n, Local No. 9*, 10 F.3d 700, 705 (10th Cir. 1993) (citation omitted).

[11] *Fowler v. Shadel*, 400 F.3d 1016, 1017 (7th Cir. 2005).

determinations underlying the Turnover Order in this appeal.

C. Election of Remedies Defense and Procedure of the Bankruptcy Court

The Debtors further argue that the Trustee is estopped from seeking turnover of the Cheaters Funds they received post-petition under the Election of Remedies doctrine. They argue that by demanding that Cheaters make payments to the Trustee, he may not choose a different remedy to enforce the Turnover Order. They also argue that the Surcharge Motion was procedurally faulty because the Trustee failed to serve a summons on the Debtors and their counsel and they contend service of a summons is required under Bankruptcy Rule 9014.

These issues were not raised by the Debtors in objecting to the Trustee's Surcharge Motion,[12] and they may not raise it for the first time on appeal.[13]

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[12] Whereas these arguments may have been raised orally below, the Debtors failed to provide the Court with a transcript of the hearing on the Surcharge Motion. *See* 10th Cir. BAP L.R. 8009-1(b)(5) ("The appendix must contain all transcripts, or portions of transcripts, necessary for the court's review."). Even if we were to address the merits of Debtors' arguments relating to Rule 9014, we would dismiss them outright. Rule 9014(b) requires service of a contested *motion* pursuant to Rule 7004. It does *not* require the service of a summons.

[13] *See Walker v. Mather (In re Mather),* 959 F.2d 894, 896 (10th Cir. 1992); *Tele-Commc'ns, Inc. v. Comm'r,* 104 F.3d 1229,

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D. Bankruptcy Courts Have Authority to Surcharge Exemptions

The crux of this appeal is whether the bankruptcy court had authority to issue the Surcharge Order. We hold that it did.

Under 11 U.S.C. § 704(1)[14], a Chapter 7 trustee is required to "collect and reduce to money the property of the estate. . . . " Likewise, a Chapter 7 debtor is required to "cooperate with the trustee as necessary to enable the trustee to perform the trustee's duties under this title"[15] and "surrender to the trustee all property of the estate[.]"[16] Failure of the debtor to honor these responsibilities may lead to judgments against the debtor requiring turnover or barring the debtor's Chapter 7 discharge.[17]

To enforce these continuing obligations, a majority of courts hold that a bankruptcy court is empowered

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1233 (10th Cir. 1997) (citing *Anschutz Land & Livestock Co. v. Union Pac. R.R. C.*, 820 F.2d 338, 344 n.5 (10th Cir. 1987)) (Appellate courts "should not be considered a 'second shot' forum . . . where secondary, back-up theories may be mounted for the first time.").

[14] All statutory references herein are to the Bankruptcy Code, unless stated otherwise. Because the Debtors filed for Chapter 7 relief before October 17, 2005, the provisions of the Bankruptcy Code which apply in this case were those in effect before the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

[15] 11 U.S.C. § 521(3).

[16] 11 U.S.C. § 521(4).

[17] *See* 11 U.S.C. § 727.

under § 105(a) to authorize the trustee to "surcharge" the debtor's exempt assets to compensate the estate for property of the estate which the debtor refuses to surrender.[18] We agree. Section 105(a) provides that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." Section 704 and 521 of the Bankruptcy Code require the debtor to turn over property of the estate to a Chapter 7 trustee. In authorizing a Chapter 7 trustee to enforce these obligations against exempt property, a bankruptcy court does nothing more than issue an order "that is necessary or appropriate to carry out the provisions" of the Bankruptcy Code.[19] To that end, courts issuing surcharge orders are not using Section 105(a) in the

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[18] *Latman v. Burdette,* 366 F.3d 774, 785-86 (9th Cir. 2004); *In re Mazon,* No. 9:05-BK-04213-MGW, 2007 WL 1437370, at *4 (Bankr. M.D. Fla. May 11, 2007); *In re Koss,* 319 B.R. 317, 322-23 (Bankr. D. Mass. 2005); *In re Hamblen,* 354 B.R. 322, 325-26 (Bankr. N.D. Ga. 2006); *In re Karl,* 313 B.R. 827, 830 (Bankr. W.D. Mo. 2004).

[19] A broad interpretation of the Supreme Court's recent decision in *Marrama v. Citizens Bank of Massachusetts,* 127 S.Ct. 1105, 1112 (2007) further suggests that a bankruptcy court's authority under § 105(a) and general principles of equity is sufficient to issue orders (such as surcharge orders) necessary to avoid an abuse of the bankruptcy process. *See also* Christopher W. Frost, *Marrama v. Citizens Bank of Massachusetts: Strict Construction Versus Inherent Authority,* 27 No. 4 Bankr. Law Letter 1 (April 2007) ("Marrama may signify the Court's willingness . . . to consider the systematic limitations of the bankruptcy process and the authority of the bankruptcy judge to guard against its abuse.").

abstract to create new law, but are using it to augment those obligations found elsewhere in the Bankruptcy Code.[20]

The Court finds persuasive the analysis in *In re Mazon,* wherein the court explained that concealing and failing to turn over assets to a Chapter 7 trustee is tantamount to claiming an additional and unauthorized exemption "because the concealment and dissipation prevents administration of the assets by a trustee for the benefit of creditors."[21] The *Mazon* court reasoned that a court's ability to issue surcharge orders is necessary to "prevent what would otherwise be a fraud on the court and on creditors caused by the debtor's failure to schedule and turn over estate assets."[22]

As the Ninth Circuit Court of Appeals stated in *In re Latman,* authorizing a surcharge of exempt

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[20] *See Norwest Bank Worthington v. Ahlers,* 485 U.S. 197, 206 (1988) (holding that whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code).

[21] *In re Mazon,* No. 9:05-BK-04213-MGW, 2007 WL 1437370, at *2 (Bankr. M.D. Fla. May 11, 2007)

[22] *Id.* at *3. The Court notes that *Mazon* involved debtors who both concealed and failed to turn over property of the estate, whereas the Debtors in the present case disclosed the Cheaters Funds from the outset of their case. Despite this distinction, the Court believes the analysis in *Mazon* relating to a court's authority to issue a surcharge order is insightful and relevant to this case.

property is not punitive in nature.[23] Where a debtor deserves to be punished for failing to turn over property of the estate, a trustee should file an adversary proceeding to bar or revoke the debtor's discharge. The result of a judgment barring a debtor's discharge is that property of the estate is still subject to the trustee's administration and the debtor does not receive the benefit of a discharge.[24] But even when a debtor's discharge is revoked, the debtor is still required to surrender, and the trustee is still required to pursue, property of the estate. As such, revoking the debtor's discharge does little to benefit the estate. A debtor whose discharge is revoked is likely to be even more recalcitrant in responding to a trustee's efforts to recover property of the estate. In contrast, surcharging a debtor's exemption is aimed at the administration of the estate only, and does not punish the debtor.[25] In essence, surcharging the debtor's exempt property is a way to accomplish what the debtor was required to do in the first place – provide specific value to the estate. Where the property withheld by the debtor is definite, there is no reason why a court cannot reach that same amount of exempt property. As the *Latman* court recognized, to hold otherwise would allow the debtor a windfall in

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[23] *Latman v. Burdette*, 366 F.3d 774, 785 (9th Cir. 2004).

[24] *Id.* at 783.

[25] *Id.* at 786 ("[S]urcharge may be the only means fairly to ensure that debtors retain their statutory 'fresh start,' while also permitting creditors access to property in excess of that which is properly exempted under the Bankruptcy Code.").

that the debtor's recalcitrance would grant the debtor an avenue to steal from the estate.[26] The debtor would leave bankruptcy with exempt assets *plus* the assets which he or she failed to turn over to the trustee. This result would be inequitable and at odds with specific provisions of the Bankruptcy Code. It is precisely the kind of situation § 105(a) was designed to remedy.

To that end, we agree with the holding of *Latman* and hold that a bankruptcy court may authorize a trustee to "surcharge" a debtor's exempt property to the extent necessary to make the estate whole where a debtor fails to turn over non-exempt property of the estate after being ordered to do so.[27] A bankruptcy court authorizing a "surcharge" need not make a finding of fraud or hold the debtor in contempt. Of course, a court's use § 105(a) is discretionary and equitable in nature,[28] so a "surcharge" should be authorized only where it is necessary to further the

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[26] *Id.* at 785.

[27] There may be other situations where a surcharge order would be appropriate, but we need not discuss those in this appeal.

[28] See *U.S. v. Energy Res. Co.*, 495 U.S. 545, 549 (1990); *In re Smart World Techs., LLC*, 423 F.3d 166, 184 (2d Cir. 2005) ("The equitable power conferred . . . by section 105(a) is the power to exercise equity in carrying out the *provisions* of the Bankruptcy Code, rather than to further the purposes of the Code generally, or otherwise to do the right thing.") (quoting *In re Dairy Mart Convenience Stores, Inc.*, 351 F.3d 86, 92 (2d Cir. 2003)).

provisions of the Bankruptcy Code and where such an order is equitable.[29]

In this case, the bankruptcy court's Turnover Order implicitly found that the Cheaters Funds were property of the estate and not exempt, ordering the Debtors to turn those funds over to the Trustee. The Debtors failed to comply with the Turnover Order so the Surcharge Order ensued. From the record on appeal, we cannot say that the bankruptcy court abused its discretion in issuing the Surcharge Order.

The Debtors argue that even if the Surcharge Order was appropriate, it had the effect of a "double surcharge" because it required the Debtors to pay the taxes and fees associated with liquidating their exempt retirement accounts. We disagree. The goal of a surcharge is to make the estate whole for a debtor's failure to turn over property of the estate. The estate should be in the same position as it would have been if the debtor had timely complied with the trustee's turnover requests. In this case, if the estate was forced to pay the fees for liquidating the exempt retirement accounts, the estate would not be made whole. It would be compensated for the amount of the Cheaters Funds, but would be decreased by the

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[29] We are aware that the *Latman* court pointed to a more definite two part test for authorizing a "surcharge," but the authority for this test is unclear. 366 F.3d at 786. Section 105(a) is at heart a provision based in equity. We see no reason to unnecessarily bind a court's discretion.

amount of the fees and penalties incurred to liquidate the retirement funds.

It may be argued that a debtor's exemptions are sacrosanct under cases such as *Taylor v. Freeland & Kronz*,[30] and that today's decision infringes on a debtor's right to protect exempt property.[31] We believe this argument goes too far. A debtor's right to exempt property from the bankruptcy estate is significant and should be protected by a bankruptcy court. But that right is not absolute. Bankruptcy courts may impact a debtor's exemption in a variety of contexts, such as attempts to conceal property[32] or where amendments to exemption claims are made in bad faith or prejudice third parties.[33] Unlike those situations, today's decision has only a minimal impact on a debtor's exemptions since it impacts the form but not the value thereof. Because a surcharge should only be for the value of property the debtor withheld from the estate, the debtor will leave the bankruptcy case with the property of the same value as if he had timely surrendered property of the estate and retained only exempt property.

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[30] 503 U.S. 638 (1992).

[31] The Court notes that even the *Taylor* Court did not address whether a bankruptcy court may employ authority under § 105(a) to disallow a claimed exemption after the time period had expired to object to the claimed exemptions.

[32] *In re Cogliano*, 355 B.R. 792 (9th Cir. BAP 2006).

[33] *In re Kaelin*, 308 F.3d 885 (8th Cir. 2002).

An argument might be made that the bankruptcy court lacked jurisdiction to issue the Surcharge Order because the funds in the retirement account may have never been property of the estate under *Patterson v. Shumate*.[34] The record on appeal does not indicate whether the Debtors' retirement account was qualified under the Employee Retirement Income Security Act ("ERISA"), nor did the Debtors argue this issue before the bankruptcy court or on appeal. They argue only that the retirement funds were exempt property. As such, the Debtors have waived their right to argue that the bankruptcy court lacked jurisdiction over the retirement account under *Patterson*.[35] To be sure, if the Debtors had argued this issue before the bankruptcy court and if the evidence on appeal established that the retirement account was ERISA qualified, our holding might be different. But without such arguments and facts before us, we can only conclude that the retirement account was exempt property – property that was initially property of the estate but then became exempt. This is an important distinction because bankruptcy courts have jurisdiction over exempt property but lack jurisdiction over property which was never property of the estate in the first place.[36] Since the Debtors argue

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[34] 504 U.S. 753 (1992).

[35] *See supra* n.13.

[36] *See In re Hamblen*, 354 B.R. 322, 329-330 (Bankr. N.D. Ga. 2006); *see also Wal-Mart Stores, Inc. v. Carpenter (In re Carpenter)*, 245 B.R. 39, 52 (Bankr. E.D. Va.), *aff'd*, 252 B.R. 905 (E.D. Va. 2000), *aff'd*, 36 F. App'x 80 (4th Cir. 2002) ("Although

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only that the retirement funds are exempt property and do not address ERISA issues, we believe the bankruptcy court had jurisdiction to issue the Surcharge Order.

Today's decision has less to do with the protections afforded a debtor's exemptions than it has to do with enforcing the provisions of the Bankruptcy Code and avoiding manipulation of the estate. As one court stated, "the purpose is not to 'punish' the debtor, but to reach an equitable result by preserving the spirit of the Bankruptcy Code and the creditors' reasonable expectations in the event of liquidation."[37] We are sensitive to the notion that bankruptcy courts have an obligation to protect a debtor's right to exemptions. In determining whether a surcharge is appropriate, bankruptcy courts should balance the concern for protecting exemptions with the need to enforce the debtor's responsibilities under the Code. We also recognize that the facts of each case will pose distinct and different concerns for a bankruptcy court. We hold that in this case the bankruptcy court did not abuse its discretion in determining that a surcharge was appropriate.

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the exempt property is no longer property of the estate, the court still retains jurisdiction over the property[.]"); *In re Stinson*, 221 B.R. 726, 730 (Bankr. E.D. Mich. 1998).

[37] *In re Karl*, 313 B.R. 827, 831 (Bankr. W.D. Mo. 2004).

IV. CONCLUSION

The decision of the bankruptcy court is AFFIRMED.

CLARK, Bankruptcy Judge, dissenting.

The majority has approved the creation of a new remedy for debtor misconduct – invading the Debtors' pension plan and exemptions. New remedies such as this should be created by Congress, not the courts.

I agree with the majority's opinion that the "Cheaters" stream of income is not exempt. I agree that the Turnover Order is a final order from which no timely appeal was taken, and I agree that the Trustee is not estopped from seeking alternative remedies. I disagree with respect to the "surcharge" of Debtors' exemptions.

The Majority Should Not Use § 105 to Create a Remedy that is Unavailable Under § 522(c)

Section 522(c) of the Bankruptcy Code specifically defines the instances where a debtor's exempt property my be surcharged.[1] Failure to turnover

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[1] The operation of § 522(c) is limited in scope and goes nowhere near as far as the majority proposes with the Surcharge Order. Section 522(c) provides that property exempted under § 522 is not liable during or after the case for any debt with the exception of debts arising under § 523(a)(1) or (5), debts secured by certain liens, a debt specified in § 523(a)(4) or (6)

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property of the estate and failure to obey a court order do not fall within any of the enumerated sections of § 522(c). The majority should not be permitted to use § 105 to judicially amend § 522(c). Section 522(c) is a detailed and specific statute. Section 105 is a general statute. A precisely drawn, detailed statute preempts more general remedies, and it braces the preemption claim when the general remedy extends the limits of the specific statute. *EC Term of Years Trust v. United States*, 127 S.Ct. 1763, 1767 (2007). Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied in the absence of evidence of a contrary legislative intent. *TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) (quoting *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-617 (1980)).

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owed by an institution-affiliated party of an insured depository institution, or debts in connection with fraud in the obtaining of student loans. Because the surcharge approved by the majority goes well beyond the remedy provided under § 522(c), the majority's opinion leaves § 522(c) creditors to look to the remains the debtor's exempt assets after the trustee has satisfied his surcharge. The surcharge will defeat the statutory treatment of § 522(c) creditors by reducing § 522(c) creditors to a second priority behind the trustee's surcharge. The "categorical reordering of priorities that takes place at the legislative level of consideration is beyond the scope of judicial authority." *United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 229 (1996).

The Power of § 105 is Limited

The majority argues that § 105 authorizes the surcharge of Debtors' exempt property in order "to augment those obligations found elsewhere in the Bankruptcy Code." *See* Majority Opinion at 7. The word "augment" is defined to mean "[t]o make greater in size, number, amount, degree, etc.; to increase, enlarge, extend." *Oxford English Dictionary Online* (2007). Bankruptcy courts must use the equitable powers under § 105 within the confines of the Bankruptcy Code and must not increase, enlarge or extend those powers through judicial fiat. "[W]hatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code." *Norwest Bank Worthington v. Ahlers,* 485 U.S. 197, 206 (1988). The majority cites at 7 n.19 to *In re Marrama*, 127 S.Ct. 1105 (2007) (5-4 decision), for the proposition that general principles of equity are sufficient to issue the surcharge order. *Marrama* does not go so far. The *Marrama* Court allows the use of § 105 to authorize the immediate denial of a motion to convert filed under § 706 in lieu of a conversion order "that merely postpones the allowance of equivalent relief[.]" 127 S.Ct. at 1112. *Marrama* does not increase, enlarge, or extend the power of § 105 beyond the confines of the Bankruptcy Code. What *Marrama* does is allow the use of § 105 to provide an immediate remedy as opposed to an equivalent, but postponed remedy.

The Surcharge Fails the *Latman* Test

The majority identifies five published opinions to support the concept of surcharging a debtor's exemptions, and from that argues that "a majority of courts hold that a bankruptcy court is empowered under § 105(a) to authorize the trustee to 'surcharge' the debtor's exempt assets[.]" Majority Opinion at 7. Given the length of time that the Bankruptcy Code has been in existence and given the number of courts faced with situations where a debtor fails to turnover property of the estate, five opinions is hardly a majority. The majority's leading case, *Latman v. Burdette,* 366 F.3d 774 (9th Cir. 2004), holds that a bankruptcy court "may equitably surcharge a debtor's statutory exemptions when reasonably necessary both to protect the integrity of the bankruptcy process and to ensure that a debtor exempts an amount no greater than what is permitted by the exemption scheme of the Bankruptcy Code."[2] If the test defined in *Latman* is applied to the facts of this case, the surcharge of Debtors' exempt assets would be prohibited.[3]

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[2] *Id.* at 786.

[3] Under *Latman,* a surcharge of the debtor's exempt assets is only permissible when it is necessary to ensure that the debtor exempts an amount no greater than what is permitted by the exemption scheme of the Bankruptcy Code. In the present case, no one is suggesting that the exemptions to be surcharged are excessive.

Other Remedies are Available

Congress created a variety of remedies to deal with situations where a debtor fails to turnover property of the estate or fails to obey a court order. A trustee has turnover powers under § 542, a trustee is vested with certain rights and avoiding powers under § 544, a trustee may avoid preferences under § 547, fraudulent transfers under § 548, postpetition transfers under § 549, and transfers to third parties under § 550. A trustee may bring an action under § 727 to have the debtor's discharge denied or revoked.[4] If a trustee believes that a bankruptcy crime has been committed, the trustee is duty bound under 18 U.S.C. § 3057 to report the facts and circumstances to the United States Attorney for criminal prosecution. Section 523(a)(13) specifically carves out any order of restitution issued under Title 18 of the United States Code from a debtor's discharge. Congress knew how to fashion remedies for the estate, and chose not to surcharge a debtor's exempt assets as a remedy for the failure to turnover property or the failure to obey a court order. A trustee is armed with a panoply of remedies under the existing Bankruptcy Code. Where an alternate remedy exists at law, equitable relief is not available. *Switzer v. Coan,* 261 F.3d 985, 991 (10th Cir. 2001). It is fundamental that equity will not grant relief if the complaining party has, or by

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[4] Perhaps the majority is suggesting to the lower courts that a "surcharge" is available where it is easier than the statutory remedies.

exercising proper diligence would have had, an adequate remedy at law, or by proceedings in the original action. *Winfield Assocs., Inc. v. Stonecipher,* 429 F.2d 1087, 1090 (10th Cir. 1970). Here, there is no evidence in the record that the Trustee made any effort to diligently recover the stream of income until some five months after the petition date. The equitable powers of the court should not be utilized to save a less-than-diligent trustee from the consequences of his errors.

Another remedy is available to compensate this estate for its loss. The Debtors filed Chapter 7 bankruptcy on October 14, 2005. With the filing, the Debtors disclosed their interest in the Limited Partnership in the Cheaters television show, and they disclosed a monthly income ranging from $700.00 to $1,700.00 from the limited partnership. The Debtors did not claim the proceeds to be exempt in the original schedules or statements. For reasons unknown and unexplained in the record, with full knowledge that the Debtors were receiving, and not turning over, between $700.00 and $1,700.00 per month in nonexempt income, the Trustee failed to timely object to, or seek an extension of time to object to, the Debtors' discharge[5] under § 727. Even more inexplicably the Chapter 7 Trustee failed to file a motion for turnover of the proceeds until late March 2006, more than 5

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[5] The deadline for filing complaints objecting to the Debtors' discharge was February 13, 2006. Debtors received their discharge on March 7, 2006.

months after the petition date.[6] It is the trustee's duty to collect and reduce to money the property of the estate and to close the estate as expeditiously as is compatible with the best interests of the parties. For a Chapter 7 trustee to fail to take action to collect a stream of nonexempt income for over 5 months smacks of dereliction and invites a further inquiry. Certainly, fault lies with the Debtors, but to the extent that the Trustee contributed to this problem, the Trustee should contribute to the solution – with cash.[7] It seems rather disingenuous for the Trustee to seek an "equitable" remedy from the court, given the facts of this case and the apparent failings by the Trustee.

Courts May Not Equitably Surcharge a Debtor's Pension

Equitable grounds are insufficient to support the surcharge of a debtor's pension[8] – even a debtor who

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[6] Nowhere in the Trustee's Motion for Turnover, and nowhere in the Trustee's Motion for Surcharge, does the Trustee allege that he made any demand that the Debtors turnover the income stream prior to the March, 2006 Turnover Motion.

[7] Pursuant to Bankruptcy Rule 2010, all trustees must carry a bond conditioned upon the faithful performance of the trustee's official duties.

[8] It is not clear from the record whether or not the Debtors' pension plans are ERISA qualified or whether they contain anti-assignment or anti-alienation provisions. For purposes of this argument, it is assumed that the Debtors' pension plans are

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has misbehaved. *See Guidry v. Sheet Metal Workers Nat'l Pension Fund,* 493 U.S. 365 (1990). Guidry was the chief executive officer of the Sheet Metal Workers International Association, Local 9 (the "Union"), and a trustee of the Union's pension fund. Guidry's employment made him eligible to receive benefits from the Union pension funds. Guidry embezzled substantial sums of money[9] from the Union. After discovery of the embezzlement, Guidry stipulated to a judgment of $275,000.00 against himself and in favor of the Union. Eventually, Guidry plead guilty to embezzling more than $377,000.00 and began serving a prison sentence. While still incarcerated, Guidry filed a complaint against the Union alleging that the Union had wrongfully refused to pay him the pension benefits to which he was alleged to be entitled. The Union, among other things, argued that Guidry breached his fiduciary duty owed to the Union, and that the Union was entitled to various remedies under the theories of conversion, fraud, equitable restitution, and constructive trust. It argued that Guidry forfeited his right to receive benefits as a result of his criminal misconduct, and that if Guidry were found to have a right to benefits, those benefits should be paid to the Union rather than to Guidry. The dispute between Guidry and the Union involved two pools of money. One pool

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ERISA qualified plans, or contain anti-assignment or anti-alienation provisions.

[9] An audit indicated that over $998,000.00 was missing from the Union funds.

of money consisted of Guidry's interest in the Union's ERISA qualified pension plan and payable to Guidry over the term of his retirement (the "Plan Funds"). The other pool of money consisted of funds paid to Guidry from the pension plan and held in Guidry's personal bank account (the "Bank Account Funds"). The Bank Account Funds had not been commingled with other funds and were claimed exempt by Guidry under state law.

In ruling that because the Union's claims did not override ERISA's anti-alienation provisions, the Court reasoned that were it to accept the Union's position, ERISA's anti-alienation provision would be inapplicable whenever a judgment creditor relied on the remedial provisions of a federal statute, and that such an approach would eviscerate the protections of ERISA's prohibition on assignment or alienation of pension benefits.[10]

With respect to the Union's equitable arguments, the Court stated, at 493 U.S. at 376-377 (footnote omitted), that:

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[10] If an ERISA qualified plan's anti-assignment provision is violated by payment directly to a trustee, the plan may lose both its ERISA qualification and its tax exempt status. *See McLean v. Cent. States, Se. & Sw. Areas Pension Fund*, 762 F.2d 1204, 1206 (4th Cir. 1985); *see also Anderson v. Raine (In re Moore)*, 907 F.2d 1476, 1480-81 (4th Cir. 1990) ("[A] plan's ERISA-qualification and tax exempt status depend on compliance with the anti-assignment provisions in 26 U.S.C. § 401(a)(13) and 29 U.S.C. § 1056(d)(1).").

Nor do we think it appropriate to approve any generalized equitable exception – either for employee malfeasance or for criminal misconduct – to ERISA's prohibition on the assignment or alienation of pension benefits. Section 206(d) reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners (and their dependents, who may be, and perhaps usually are, blameless), even if that decision prevents others from securing relief for the wrongs done them. If exceptions to this policy are to be made, it is for Congress to undertake that task.

As a general matter, courts should be loath to announce equitable exceptions to legislative requirements or prohibitions that are unqualified by the statutory text. The creation of such exceptions, in our view, would be especially problematic in the context of an antigarnishment provision. Such a provision acts, by definition, to hinder the collection of a lawful debt. A restriction on garnishment therefore can be defended *only* on the view that the effectuation of certain broad social policies sometimes takes precedence over the desire to do equity between particular parties. It makes little sense to adopt such a policy and then to refuse enforcement whenever enforcement appears inequitable. A court attempting to carve out an exception that would not swallow the rule would be forced to determine whether application of the rule in particular circumstances would be 'especially' inequitable. The impracticability of

> defining such a standard reinforces our conclusion that the identification of any exception should be left to Congress.

Pension funds that are protected by anti-alienation or anti-garnishment provisions are not available for surcharge. "Indeed, this Court itself vigorously has enforced ERISA's prohibition on the assignment or alienation of pension benefits, declining to recognize any implied exceptions to the broad statutory bar." *Patterson v. Shumate,* 504 U.S. 753, 759 (1992) (citing *Guidry,* 493 U.S. 365).

Courts May Not Equitably Surcharge a Debtor's Exemptions

The question with respect to the "Bank Account Funds" which was not addressed by the Court in *Guidry,* 493 U.S. 365, was later taken up by the Tenth Circuit Court of Appeals in *Guidry v. Sheet Metal Workers Nat'l Pension Fund,* 39 F.3d 1078 (1994) (rh'g en banc). The dissent is noteworthy because it reminds us that even courts of equity must follow the law, and must not be permitted the luxury of creating their own remedies in the name of equity. The dissent states at 39 F.3d at 1087:

> The rain it raineth on the just
> And also on the unjust fella:
> But chiefly on the just, because
> The unjust steals the just's umbrella.
>
> Charles Bowen, Thad Stem Jr., and
> Alan Butler, *Sam Ervin's Best Short Stories,*
> (1973).

The majority today has ruled that a thief is free to keep the fruits of his crime under Colorado law.

The dissent goes on at 39 F.3d 1089 (footnote omitted) to argue that:

> The majority has concluded a faithless servant, an embezzler, a man who steals from the hard earned labors of the workers, is entitled to keep the fruits of his crime. I do not believe the Colorado legislature or the Colorado courts would permit such an unconscionable result. It is nonsensical to assume Colorado would want a thief to keep ill-gotten gains. Like Mr. Bumble of *Oliver Twist,* I believe "[i]f the law supposes that . . . the law is a ass – a idiot," and I am not willing to believe Colorado law to be either.

Despite a vigorous dissent, the majority found Guidry's Bank Account Funds to be exempt under the Colorado exemption statute. The majority's ruling was in keeping with the rule that exemptions must be construed liberally and it is assumed that, in the absence of specific language in the statute limiting the extent of an exemption, the legislature did not intend to impose a limitation. Under *Guidry,* the law of this Circuit is that absent specific statutory language to the contrary, state exemption law will not be limited regardless of the equities of the case.

The Surcharge of Debtors' Exemptions Impermissibly Invades State Law

When enacting the bankruptcy laws under Title 11 of the United States Code, Congress chose not to preempt state exemption law. In fact, Congress did the opposite. Congress gave the decision to the individual states concerning which exemptions may be elected by their citizens. The State of Oklahoma opted out of the federal exemption list pursuant to § 522(b)(1). The exemptions that the majority would permit to be surcharged are exemptions enacted by the State of Oklahoma for the people of Oklahoma. The Bankruptcy Court for the Western District of Oklahoma lacks the power to modify Oklahoma state law.

The majority supports its decision to allow the surcharge of the Debtors' state law exemptions citing to the broad equitable powers of 11 U.S.C. § 105. Even the broadest possible reading of § 105 cannot be interpreted to preempt Oklahoma's exemption laws. Federal law preempts state law in three circumstances: (1) when Congress explicitly defines the extent to which the enacted statute preempts state law, (2) when state law actually conflicts with federal law, or (3) when state law attempts to regulate conduct in a field that Congress intended the Federal Government to occupy exclusively. *United States v. Wagoner County Real Estate,* 278 F.3d 1091, 1096 (10th Cir. 2002). In any preemption analysis, congressional intent is the ultimate touchstone. *Cipollone v. Liggett Group, Inc.,* 505 U.S. 504, 516 (1992).

Congress did not intend for the Bankruptcy Code to pre-empt all state laws that otherwise constrain the exercise of a trustee's powers. *Midlantic Nat'l Bank v. N.J. Dep't Envtl. Prot.*, 474 U.S. 494 (1986). Because 11 U.S.C. § 105 does not preempt Oklahoma's exemption laws, the Bankruptcy Court must look to the rulings of the highest state court, and, if no such rulings exist, must endeavor to predict how that high court would rule. *Johnson v. Riddle,* 305 F.3d 1107, 1118 (10th Cir. 2002).

Oklahoma State Law Prohibits the Surcharge of Exemptions

Bankruptcy courts must resort to state law for interpretation of state exemption rights. *In re Duncan,* 329 F.3d 1195, 1198 (10th Cir. 2003). In Oklahoma, a debtor's exemptions cannot be surcharged for the payment of any debt.[11] As with most states, Oklahoma has long construed its exemptions laws in a liberal manner.[12] "We have liberally construed our

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[11] For example, Oklahoma's statutory homestead provision, Oklahoma Statutes title 31 § 1, states in part: " . . . the following property shall be reserved to every person residing in the state, exempt from attachment or execution and every other species of forced sale for the payment of debts, except as herein provided[.]"

[12] This same liberal approach is shared by the Bankruptcy Appellate Panel of the Tenth Circuit. "When interpreting exemption statutes, the interpretation must further the spirit of such laws. Specifically the court must be guided by the general principle that exemption statutes are to be liberally construed so

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homestead exemption in the interest of the family home." *State of Okla. v. Ten (10) Acres of Land,* 877 P.2d 597, 601 (Okla. 1994) (citing *First Nat'l Bank v. Burnett,* 254 P. 95, 96 (Okla. 1927)). "Each member of the family residing upon the homestead and in good faith making it a home is equally protected by the statute, and has such an interest as will prevent its forcible seizure for the debts or liabilities of either." *Cassady v. Morris,* 91 P. 888, 890 (Okla. Terr. 1907). In ruling that property protected by Oklahoma's exemption laws were not subject to forfeiture under Oklahoma's Uniform Controlled Dangerous Substance Act, the Supreme Court of Oklahoma stated that "[w]e believe that the intent of our homestead exemption statutes was primarily protection of the homestead. We cannot find that the intent of Oklahoma's homestead exemption statute is to apply only to forced sales for the payment of debts and not otherwise." *State of Okla. v. Ten (10) Acres of Land,* 877 at 601. In a case certified[13] by the United States Bankruptcy Court for the Western District of Oklahoma, the Supreme Court of Oklahoma stated that "we are committed to the rule that statutes exempting property from forced sale for the payment of debts

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as to effect their beneficent purposes." *In re Bechtoldt,* 210 B.R. 599, 601 (10th Cir. BAP 1997) (citing *In re Pancratz,* 175 B.R. 85, 93 (D. Wyo. 1994)).

[13] Certification to a state's Supreme Court is appropriate where the proceeding involves important questions of state law. *Swink v. Sunwest Bank (In re Fingado),* 955 F.2d 31, 33 (10th Cir. 1992).

are to be given a reasonable construction to effect their intent and purpose. In cases of doubt, the doubt will be resolved in favor of the exemption." *In re Anderson,* 932 P.2d 1110, 1112 (Okla. 1997). Bankruptcy courts must interpret state exemption laws under the state's rules of statutory construction. *In re Hodes,* 308 B.R. 61, 68 (10th Cir. BAP 2004). In another case certified by the United States Bankruptcy Court for the Western District of Oklahoma, the Supreme Court of Oklahoma ruled that:

> Because Oklahoma has opted out of the federal scheme, debtors are limited to the exemptions provided under state law. Exemptions are intended to provide debtor's [sic] with sufficient assets for a fresh start and to keep bankrupts from becoming a charge on society. . . . It is our duty to give effect to legislative acts, not to amend, repeal or circumvent them.

In re Alexander, 980 P.2d 659, 664-665 (Okla. 1999) (footnotes omitted).

In a State where even its own drug forfeiture laws cannot defeat a debtor's claimed exemptions, it is highly unlikely that the Supreme Court of Oklahoma would permit a court, in the name of equity, to fashion a generalized remedy that would amend, repeal, or circumvent the exemption laws of the State of Oklahoma.

The Majority Cannot Do Indirectly That Which Is Prohibited Directly

The Trustee, by seeking to surcharge the Debtors' exemptions is, in essence, objecting to and seeking to disallow the Debtors' claimed exemptions. The Trustee's time for objecting to the Debtors' exemptions expired, and the Trustee should not be entitled to now object to the Debtors' exemptions on equitable grounds or on any other grounds. Without a timely objection, even claimed exemptions that have no basis in state law cannot be denied. *In re Coones*, 996 F.2d 250, 251 (10th Cir. 1993). The United States Supreme Court in *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645 (1992), states that "[w]e have no authority to limit the application of § 522(*l*) to exemptions claimed in good faith." Likewise, bankruptcy courts have no authority to limit the application of § 522(*l*) to exemptions on equitable grounds.

Lack of Jurisdiction

To the extent that the bankruptcy court's Surcharge Order purports to be a judgment[14] against the Debtors' pensions, the bankruptcy court lacks

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[14] If the Surcharge Order does nothing more than give permission to the Trustee to sue the Debtors' pension plan, the order is meaningless. A trustee always has the duty to collect and liquidate property of the estate, and does not need a court order to do so. The automatic stay does not prevent a trustee from prosecuting any of the estate's legal rights. *In re Lyngholm*, 24 F.3d 89, 92 (10th Cir. 1994).

jurisdiction because there is no evidence that the plan administrator has ever been served with process or even provided with notice of the surcharge action. A retirement fund, being a trust instrument, is a separate legal entity and is entitled to due process of law.[15] Before a federal court can assert personal jurisdiction over a defendant, the court must determine whether the exercise of jurisdiction comports with due process. Service of process and personal jurisdiction both must be satisfied before a suit can proceed, they are distinct concepts that require separate inquiries. *Peay v. BellSouth Med. Assistance Plan,* 205 F.3d 1206, 1209 (10th Cir. 2000). There is nothing in the record that shows service of process upon the pension plan has ever been obtained. There is nothing in the record that shows the bankruptcy court ever obtained jurisdiction over the corpus of the pension plan. These inquiries must be satisfied before the Surcharge Order with respect to the pension plan can be allowed to stand.

Conclusion

This Dissent argues several independent reasons why the Surcharge Order must not stand. I would REVERSE.

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[15] Due process requirements apply equally to bankruptcy proceedings. *Bank of Marin v. England,* 385 U.S. 99, 102 (1966).

IN THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

In re: SCRIVNER, TOBY and PISSANO, ANGELIQUE, Debtors.	Case No. **05-30226 WV** Chapter 7

ORDER ON TRUSTEE'S MOTION FOR ORDER OF CONTEMPT AND MOTION TO SURCHARGE DEBTORS' EXEMPTIONS FOR FAILURE TO COMPLY WITH ORDER FOR TURNOVER

(Filed Oct. 24, 2006)

ON THIS 17TH DAY OF OCTOBER, 2006, there came on for hearing before this Court the Trustee's Motion for Order of Contempt and Motion to Surcharge Debtors' Exemptions for Failure to Comply with Order for Turnover and Debtors' Response thereto, the Trustee appearing in person and by counsel and Debtors appearing in person and by counsel.

The Court having considered the authorities cited in the Trustee's Motion finds that the rationale for the remedy of surcharge of exempt assets as set forth in *Latman v. Burdette,* 366 F.3d 774 (9th Cir.2004), is sound and the analysis of such remedy, as discussed in *In re Karl,* 313 B.R. 827 (Bankr.W.D.Mo.2004), is compelling. Whereupon,

having otherwise considered the Motion and Debtors' Response, having heard the arguments of counsel, and being informed of the premises, the Court finds that said Motion of the Trustee should be sustained in part as more particularly set forth below.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. Debtors shall pay the Trustee $17,424.75, being the income, received by Debtors since Debtors' bankruptcy filing, as derived from the Debtors' ownership of the Limited Partnership in the Cheaters LLC TV Show.

2. Debtors shall further pay the Trustee interest upon said $17,424.75, at the rate of 6% per annum from June 1, 2006, (the date of the Order granting the Trustee's Motion to Turnover said funds) through the date of payment to the Trustee.

3. Debtors shall further pay the Trustee the sum of $1,500.00, which the Court determines to be a reasonable attorney fee incurred by the Trustee in bringing this Motion.

4. Such sums shall be delivered to the Trustee in full by Monday, November 6, 2006, being 20 days from the date of this hearing.

5. In the event said funds are not delivered to the Trustee by November 6, 2006, then the Trustee may surcharge and is hereby granted a surcharge against the Debtors' exempt property, including Debtors' retirement funds, to the extent necessary to

satisfy the sums owed under paragraphs 1 through 3 above.

6. Said surcharge shall be in the amount necessary to net to the Estate and Trustee the payment of the sums owed under paragraphs 1 through 3 above and that any taxes, penalties or fees incurred by reason of the withdrawal or borrowing of said retirement accounts shall be born by the Debtors. The Estate and Trustee shall bear such tax liability as would have been incurred for receipt of the distributions from Debtors' ownership of the Limited Partnership in the Cheaters LLC TV Show as if such funds had been turned over to the Trustee without surcharge of the exempt assets.

7. Without limitation of the finality and binding effect of the foregoing and this Order, upon request of the Trustee and notice to the Debtors, the Court may hereafter fashion such additional relief or grant such further Orders, if and to the extent necessary, to facilitate the Trustee carrying out the surcharge of and actual recovery of funds from the exempt assets.

/s/ T M Weaver
UNITED STATES
BANKRUPTCY JUDGE

APPROVED FOR ENTRY:

/s/ John D. Mashburn

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UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

IN RE: TOBY SCRIVNER and ANGELIQUE PISANO,

Debtors.

TOBY SCRIVNER and ANGELIQUE PISANO,

Appellants,

v.

JOHN D. MASHBURN, Trustee,

Appellee.

No. 07-6167
(BAP No. WO-06-122)
(Filed Aug. 11, 2008)

JUDGMENT

Before **TACHA, BRISCOE**, and **HARTZ**, Circuit Judges.

This case originated in the Bankruptcy Appellate Panel for the Tenth Circuit and was submitted on the briefs at the direction of the court.

The judgment of that court is reversed. The case is remanded to the United States Bankruptcy Appellate

Panel for the Tenth Circuit for further proceedings in accordance with the opinion of this court.

Entered for the Court,

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER,
Clerk